

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 24-847V

UNPUBLISHED

MARY ANNALEE HULL,

Petitioner,

v.

SECRETARY OF HEALTH AND
HUMAN SERVICES,

Respondent.

Chief Special Master Corcoran

Filed: January 10, 2025

Robert M. Hatch, Bronster Fujichaku Robbins, Honolulu, HI, for Petitioner.

Julia M. Collison, U.S. Department of Justice, Washington, DC, for Respondent.

DECISION¹

On May 31, 2024, Mary Hull filed a petition for compensation under the National Vaccine Injury Compensation Program, 42 U.S.C. § 300aa—10 through 34² (the “Vaccine Act”). Petitioner alleges that she suffered various injuries from two human papillomavirus (“HPV”) vaccinations she received in April 2016 (no specific dates provided).³ ECF No. 1 at 2.

Because the petition was untimely filed, and Petitioner has failed to establish a basis for equitable tolling, this case is **DISMISSED**.

¹ Because this Decision contains a reasoned explanation for the action taken in this case, it must be made publicly accessible and will be posted on the United States Court of Federal Claims' website, and/or at <https://www.govinfo.gov/app/collection/uscourts/national/cofc>, in accordance with the E-Government Act of 2002. 44 U.S.C. § 3501 note (2018) (Federal Management and Promotion of Electronic Government Services). **This means the Decision will be available to anyone with access to the internet.** In accordance with Vaccine Rule 18(b), Petitioner has 14 days to identify and move to redact medical or other information, the disclosure of which would constitute an unwarranted invasion of privacy. If, upon review, I agree that the identified material fits within this definition, I will redact such material from public access.

² National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755. Hereinafter, for ease of citation, all “§” references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2012).

³ A footnote states that Petitioner received her first HPV vaccine on May 28, 2008, but this statement appears erroneous because, in addition to contradicting the body of the petition, Petitioner would have been six years old at that time. ECF No. 1 at 1 n.1. The earliest the CDC recommends giving children HPV vaccines is nine years old (<https://www.cdc.gov/hpv/parents/vaccine-for-hpv.html>).

Relevant Factual Background

After the April 2016 vaccinations, Petitioner stated that unspecified injuries “progressed in the subsequent years” and she became aware in June 2020 that the HPV vaccine could cause adverse effects. ECF No. 1 ¶¶ 5, 6. Petitioner stated she was later diagnosed with postural orthostatic tachycardia syndrome (POTS). *Id.* ¶ 8. Petitioner has not filed any medical records to establish these facts.

Petitioner alleged the preceding medical history in the petition and repeated the history in her response to the order to show cause. Facially, Petitioner’s claim herein was filed over *eight* years after the HPV vaccinations, which were administered in 2016, and over *eight* years from the time she began manifesting symptoms in 2016. But Petitioner maintains her delay is excusable. Petitioner has only stated, but not attested in an affidavit, that at the time these vaccinations occurred, no Vaccine Information Statement (VIS) was provided, and no information was relayed about the Vaccine Program. Petitioner again only stated, but did not attest, she became aware that the HPV vaccine could have potential adverse effect shortly before filing her vaccine claim in June 2020. As these vaccinations would have occurred when Petitioner was thirteen or fourteen years old, Petitioner similarly did not submit an affidavit from either of her parents, one at least who presumably would have attended the vaccination appointments, about whether any counseling or information was provided about the HPV vaccine or the Vaccine Program.

Relevant Procedural History

Given that the timeliness of the claim was legitimately called into question merely by the face of the actual Petition, while the case was still in the initial “pre-assignment review,”⁴ I ordered Petitioner to show cause why the claim had not been filed outside the Act’s 36-month statute of limitations. Sec. 16(a)(2); ECF No. 6.

On August 9, 2024, Petitioner filed a response. ECF No. 9. Petitioner did not dispute that her symptoms progressed from 2016 until 2020, or that her petition was filed in 2024 (and not sooner than the statute of limitations deadline), but instead argued that the limitations period should be equitably tolled. Petitioner asserted that she had diligently pursued her rights once she became aware of her legal rights. Petitioner also made allegations not relevant to a Vaccine Act claim, about the perfidious conduct of the vaccine manufacturer in fraudulently concealing the HPV vaccine’s harmful character from the public. ECF No. 9 at 17. Relatedly, Petitioner argued that the failure of a healthcare professional to provide her with a VIS at the time of vaccination can be attributed to the

⁴ Pre-Assignment Review, or PAR, is a process utilized by the Office of Special Masters to assess whether a claim’s primary evidentiary documentation has been filed. See notice at <http://www.uscfc.uscourts.gov/vaccine-programoffice-special-masters>.

Department of Health and Human Services' failure to systematically ensure that VIS are explained and provided to all vaccine recipients. *Id.* at 3.

Respondent submitted a brief of his own, arguing for dismissal due to untimeliness.⁵ ECF No. 7. Respondent maintained that Petitioner in fact had not diligently pursued her rights before filing a vaccine claim in 2024. Respondent also disputed the veracity of contentions about the manufacturer's conduct, and whether it could in any event constitute an extraordinary circumstance that would serve as a basis for tolling of the statute.

Legal Standards

The Vaccine Act's statute of limitations is thirty-six months. Sec. 16(a)(2). The statute begins to run from the manifestation of the first objectively cognizable symptom, whether or not that symptom is sufficient for diagnosis (or even recognized by a claimant as significant). *Id.*; *Carson v. Sec'y of Health & Hum. Servs.*, 727 F.3d 1365, 1369 (Fed. Cir. 2013).

The Federal Circuit has held that the doctrine of equitable tolling can apply to Vaccine Act's statute of limitations. *See Cloer v. Sec'y of Health & Hum. Servs.*, 654 F.3d 1322, 1340-41 (Fed. Cir. 2011). However, in keeping with applicable U.S. Supreme Court precedent, equitable tolling of a limitations period is to be permitted "sparingly." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, (1990). The appropriateness of equitable tolling is ultimately to be determined on a case-by-case basis, without rigid application of any relevant overarching guidelines. *Holland v. Florida*, 560 U.S. 631, 649–50 (2010); *accord Arctic Slope Native Ass'n v. Sebelius*, 699 F.3d 1289, 1295 (Fed. Cir. 2012).

Petitioners must prove two elements to establish equitable tolling: (1) that petitioner diligently pursued her rights, and (2) an extraordinary circumstance prevented her from timely filing the claim. *K.G. v. Sec'y of Health & Hum. Servs.*, 951 F.3d 1374, 1379 (Fed. Cir. 2020) (citing *Menominee Indian Tribe v. United States*, 577 U.S. 250, 255 (2016)).

⁵ Respondent filed his "response" to Petitioner's arguments before Petitioner had submitted her filing with those arguments. For context, this case is part on ongoing series of vaccine cases (over 50 at this point) that were filed beyond the statute of limitations deadline and have all presented the same legal arguments regarding the equitable tolling of that deadline. Since Respondent has standardized his response to these legal arguments, Respondent has chosen in some cases to file his response before Petitioner files a response to the order to show cause. As I ruled in other cases where the petitioner objected to Respondent's early filing of his response, I understand Respondent to have waived any right to later reply to Petitioner's response (if it happened to contain arguments not anticipated by Respondent) and find that Petitioner was not prejudiced or harmed by Respondent's deviation from the standard sequence of responsive filings.

When first articulating this limited exception to equitable tolling, the Federal Circuit primarily enumerated fraud and duress as a basis for equitable tolling—but not, for example, *lack of awareness* on a petitioner's part that she might have an actionable claim. *Cloer*, 654 F.3d at 1344–45 (noting that tolling of the Vaccine Act's statute of limitations period is not triggered “due to unawareness of a causal link between an injury and administration of a vaccine”). In *K.G.*, 951 F.3d at 1380–82 (Fed. Cir. 2020), the Circuit more explicitly endorsed the proposition that an individual's demonstrated mental incapacity could be a basis for equitable tolling in the Program. For a mentally incapacitated individual, the Circuit instructed that the details of the individual's relationship with her legal guardian would affect whether there was reasonable diligence or extraordinary circumstances. *K.G.*, 951 F.3d at 1382 (Fed. Cir. 2020). More recently, the Circuit concluded that a parent acting as a legal guardian did not have extraordinary circumstances preventing the filing of a petition where the parent: (1) routinely made medical decisions on behalf of the legally incapacitated individual during the relevant time period, (2) had no documented strained relationship with the individual, and (3) had no conflicts of interest dissuading the parent from filing a petition. *W.J. v. Sec'y of Health & Hum. Servs.*, 93 F.4th 1228, 1241 (Fed. Cir. 2024).

Analysis

The untimeliness of this filing is acknowledged by Petitioner, so the only question to be resolved is whether equitable tolling should save the claim. But Petitioner has failed to establish both elements of equitable tolling – diligent pursuit and extraordinary circumstances.

A) Diligent pursuit

Petitioner argues that she began to diligently pursue her claim when she learned of the possibility of adverse effects from vaccines in June 2020.

These arguments are wholly unpersuasive. It is beyond question that claims asserted in the Vaccine Program are not subject to a “discovery rule,” accruing only when a claimant *learns* he or she might possess a cause of action. Rather, the statute of limitations period is triggered by the onset of Petitioner's symptoms – whether or not onset was understood to be the start of the claimed injurious illness or condition. *Cloer v. Sec'y of Health & Hum. Servs.*, 654 F.3d 1322, 1340 (Fed. Cir. 2011) (en banc). And the failure to be advised of the Vaccine Program or the Act does not support equitable tolling of the statute of limitations period for an otherwise-untimely filed petition. *Speights v. Sec'y of Health & Hum. Servs.*, No. 03-2619V, 2013 WL 5944084, at *13 (Fed. Cl. Spec. Mstr. Oct. 17, 2013). Thus, a petitioner cannot generally shield an untimely claim from dismissal by asserting, even in good faith, that she literally was unaware of her Vaccine Act “rights.”

B) Extraordinary Circumstances

Petitioner's arguments about the purported fraudulent conduct of the vaccine's manufacturer, in hiding proof of the vaccine's dangers, deserve even less consideration. ECF No. 9 at 17. As a threshold matter, these contentions are speculative and not evidentiarily-supported. And regardless of their actual truth, the fact remains that the Government *has approved* the HPV vaccine for administration to minors, rendering it "covered" under the Act. The only issue to be resolved in a Program case is whether (assuming, as here, the claim is not a Table claim) the claim meets the standards for causation – and those standards have nothing to do with a manufacturer's alleged misconduct in preparation or promotion of the underlying vaccine.

These allegations also are not a basis for tolling under the circumstances. Petitioner simply has not shown that contentions of corporate misconduct not specific to, or directed at, her personally could rise to the level of the kind of "fraud" that might excuse failing to file a Program claim in a timely manner. Nor has she persuasively established that the vaccine administrator's "failure to warn," or provide a VIS in 2016, is an extraordinary circumstance. Even assuming the factual accuracy of that allegation,⁶ it remains the case (as the Circuit recognized in *Cloer*) that vaccine claims accrue upon onset – and that the failure to be advised of the Vaccine Program does not support equitable tolling. *Cloer*, 654 F.3d at 1340; *see also Speights*, 2013 WL 5944084, at *13. And arguments about governmental agency knowledge of a failure to warn reflect overheated, almost-conspiratorial allegations that do not come close to excusing the claim's untimely nature.

Conclusion

Thus, Petitioner has failed to establish equitable tolling. **This case is dismissed for being untimely filed. The Clerk of Court shall enter judgment accordingly.**⁷

IT IS SO ORDERED.

s/Brian H. Corcoran
 Brian H. Corcoran
 Chief Special Master

⁶ As noted above, the vaccination appointment records stated that the "[r]isks, potential benefits and anticipated side effects [were] discussed." Exhibit 3 at 72. Petitioner's only evidence that no VIS or information about the Vaccine Program was provided is her affidavit dated October 11, 2023, in which she attested about events that occurred approximately six years earlier when she was twelve years old. Exhibit 23 ¶¶ 2, 3. Petitioner failed to submit affidavits from her parents who were both present at the vaccination appointment and who would have been the most likely people to receive medical advice and information on behalf of Petitioner.

⁷ If Petitioner wishes to bring a civil action, she must file a notice of election rejecting the judgment pursuant to § 21(a) "not later than 90 days after the date of the court's final judgment."